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Richard D. Linderman

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# Surviving Spouses—Uniform Probate Code Versus Pennsylvania's Probate, Estates and Fiduciaries Code

Pennsylvania is currently studying the advisability of incorporating parts of the Uniform Probate Code<sup>1</sup> into its newly codified Probate, Estates and Fiduciaries Code.<sup>2</sup> Many of the Uniform Probate Code's features should have considerable appeal to Pennsylvania lawyers; however, this comment will only examine possible ramifications that might affect the surviving spouse if Pennsylvania adopts Article II of the Code.<sup>3</sup>

The UPC had its genesis in an undertaking by the Section of Real Property, Probate and Trust Law of the American Bar Association in 1939, which culminated in the publication of the Model Probate Code in 1947.<sup>4</sup> Several states, including Pennsylvania, emulated much of its present probate code from the Model Code.<sup>5</sup> In 1962 a committee was appointed to review the Model Probate Code in an attempt to update it. After seven years of study and revising, the House of Delegates of the American Bar Association approved the Uniform Probate Code. A noted commentator in the probate field has written:

The product of a long study and gestation, the New Uniform Probate Code now has been approved by the American Bar Association and is available to the states for study and enactment. The new code modernizes one of the oldest and most creaky institutions

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1. UNIFORM PROBATE CODE [hereinafter referred to as UPC]. The official text of the UPC and its appended comments were prepared and published by West Publishing Company in March, 1970. It is available in paperback form.

2. PA. STAT. ANN. tit 20, §§ 101-8815 (1972) [hereinafter referred to as the Code]. This Code incorporates existing law presently found in the Estates Act, the Fiduciaries Act, the Incompetents' Estate Act, the Intestate Act, the Orphans' Court Act, the Register of Wills Act, the Wills Act and ancillary legislation. Recognizing Pennsylvania's leadership in the field of decedents estates and in view of the incorporation into the Uniform Probate Code of many of Pennsylvania's statutory innovations, our General Assembly decided to review the UPC to assure the continued success of our present statutes. If in the future, the legislature determines to adopt any or all of the Uniform Probate Code, any changes submitted to the General Assembly will be in the form of amendments to the Probate, Estates and Fiduciaries Code.

3. Article II contains the following provisions: intestate succession, elective share of surviving spouse, exempt property and allowances, wills, rules of construction and various general provisions. UNIFORM PROBATE CODE §§ 2-101 to -902.

4. 6 REAL PROPERTY, PROBATE & TRUST J. 206-07 (1969).

5. Davis, *The Proposed Codification of Pennsylvania Probate, Estate and Fiduciaries Laws*, 120 PITT. L.J. 3, 4 (1972) [hereinafter cited as Davis].

of the law—an institution whose shortcomings have been a sound of embarrassment for the legal profession.<sup>6</sup>

The UPC is long and complex but offers a flexible system for the administration of decedents' estates. Each of its features is based on a tested characteristic of some state's existing probate law. Additionally, the system will enable attorneys in a particular state to handle estates as they are accustomed to handling them or to innovate with new combinations designed to lower costs or improve client relations.<sup>7</sup>

Much of the impetus behind the UPC is the result of the success attained in the field of commercial transactions by the Uniform Commercial Code. The UCC has been adopted by forty-nine states,<sup>8</sup> thereby achieving a great degree of uniformity and predictability with respect to commercial transactions across the country. Furthermore, our population has become increasingly mobile which has led to the ownership of property rights and commercial interests in several states to become a common experience.<sup>9</sup> The Uniform Probate Code should ameliorate the problems germane in transferring property interests by death.

To Pennsylvania lawyers, the UPC is not extremely new or radical in its approach. Once he masters the unfamiliar stylistic approach, he will find that it is similar to Pennsylvania law. The most novel concept, that is different from Pennsylvania law is found in Article II<sup>10</sup> dealing with the rights of the surviving spouse. It is the purpose of this paper to compare Article II with our present Probate statutes namely, the Intestate Act,<sup>11</sup> the Estates Act,<sup>12</sup> the Wills Act<sup>13</sup> and case law. Such comparison should disclose to the reader how the rights of the surviving spouse might differ under the Uniform Probate Code and the Pennsylvania law as it exists today.

Generally speaking, Article II covers what is regarded as the substantive law of intestacy and wills and much more. Heirship is described, family relationships, as affected by formal and informal adoptions, and various categories of marriage and divorce are defined for succession purposes and to provide standard meanings for various class gifts.

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6. Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636 (1970) [hereinafter cited as Wellman].

7. *Id.* at 638.

8. Louisiana is the lone exception.

9. Davis, *supra* note 5, at 4.

10. UNIFORM PROBATE CODE §§ 2-101 to -902.

11. PA. STAT. ANN. tit. 20, §§ 2101-14 (1972).

12. *Id.* §§ 6101-17.

13. *Id.* §§ 2501-20.

Family protection devices such as homestead, exempt property, and family allowances are also included under Article II.

### I. INTESTACY

The first section of Article II addresses itself to intestacy.<sup>14</sup> Generally speaking, these statutes<sup>15</sup> have no effect on the poor, whose estates are disposed of by exempt property and allowance statutes, and they rarely apply to the rich, who dispose of their property at death by means of wills or inter vivos trusts. The result is that intestate legislation applies primarily to relatively small estates, usually in the \$20,000 to \$120,000 range.<sup>16</sup> It can be said that intestate succession statutes should reflect, so far as possible, the probable wishes of the decedent whose estate is disposed of by such statutes. The UPC definitely attempts to comply with this standard, probably more so than Pennsylvania law. Furthermore, the UPC deals with real and personal property without distinction, thus creating no problems of significance for Pennsylvania practitioners.<sup>17</sup>

Under the UPC, the intestate share of the surviving spouse is:

- (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.<sup>18</sup>

The Pennsylvania Intestate Statute provides for the surviving spouse as follows:

- (1) More than one child. One-third if the decedent is survived by

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14. UNIFORM PROBATE CODE §§ 2-101 to -113.

15. Intestate statutes are those statutes which dispose of property of a decedent who died without having written a will. In other words property passes from one person to another by death and by operation of law.

16. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1047 (1966).

17. The UPC, however, would bring about noticeable changes in other jurisdictions. Hauptfuhrer, *The Uniform Probate Code—A Modern Approach for Pennsylvania*, 41 PA. BAR ASS'N Q. 79, 80 (1969) [hereinafter cited as Hauptfuhrer].

18. UNIFORM PROBATE CODE § 2-102.

more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child; or

- (2) One child. One-half if the decedent is survived by one child only, or by no child, but by the issue of one deceased child; or
- (3) No issue. The first \$20,000 in value and one-half of the balance of the estate, if the decedent is survived by no issue. In case of partial intestacy, any amount received by the surviving spouse under the will shall satisfy pro tanto the \$20,000 allowance; or
- (4) No issue or other designated persons. All of the estate if the decedent is survived by no issue, parent, brother, sister, child of a brother, or sister, grandparent, uncle or aunt.<sup>19</sup>

It is readily apparent that the UPC is more generous to the surviving spouse than Pennsylvania. The UPC only considers parents of the decedent if there are no surviving issue whereas Pennsylvania recognizes parents, brothers and sisters of the deceased, nephews and nieces, grandparents, and uncles and aunts. Consequently, there is a greater chance the surviving spouse will be limited as to her<sup>20</sup> share. With the UPC, her chances of attaining the whole estate are improved. Pennsylvania provides the surviving spouse with a \$20,000 allowance and one-half the estate if no issue are surviving. The UPC treats the surviving spouse more favorably. If there are no surviving issue or parents of the deceased, the surviving spouse will receive all the estate, if a parent is living, she receives \$50,000 plus one-half of the balance of the intestate estate. A hypothetical example should help clarify the aforementioned discussion. For illustration purposes, homestead allowance, exempt property, and other allowances will not be considered.

<i>Gross Estate</i>	<i>Surviving Spouses Share Under Uniform Probate Code</i>
\$210,000	\$210,000 if no surviving issue or parents
	\$130,000 (\$50,000 + \$80,000) if a parent or parents survive and no issue.
	\$130,000 (\$50,000 + \$80,000) if surviving is- sue of surviving spouse also.
	\$105,000 if one or more of surviving issue are not issue of the surviving spouse.

19. PA. STAT. ANN. tit. 20, § 2102 (1972).

20. When discussing the surviving spouse, reference shall be made to the spouse in the female gender, but it applies equally to a male spouse. It is common knowledge that more females survive their spouses than males.

*Gross Estate*  
\$210,000

*Surviving Spouses Share in Pennsylvania*  
\$70,000 if decedent survived by more than one child and or the issue of a deceased child.  
\$105,000 if decedent survived by one child or the issue of one deceased child.  
\$115,000 (20,000 + 95,000) if decedent survived by no issue.  
\$210,000 if decedent is not survived by any other designated person such as parents, brothers or sisters, etc. Chances of this occurring are very slim.

Section 2-102 gives the surviving spouse a larger share than most existing statutes on descent and distribution. By so doing, the UPC reflects the desires of most married persons, who generally leave all of a moderate size estate or at least one-half of a large estate to the surviving spouse when a will is executed.<sup>21</sup> It should be remembered that a husband or wife who desires to leave the surviving spouse less than the shares provided under section 2-102 of the UPC or the Intestate Act, he or she may do so by executing a will, subject to possible election by the surviving spouse to take an elective share of one-third under the UPC and either one-third or one-half under section 8 of the Wills Act.<sup>22</sup> More will be said about election shortly.

The Uniform Probate Code contains a survivorship provision<sup>23</sup> which is more expansive than Pennsylvania's Simultaneous Death Act.<sup>24</sup> Under the UPC "any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession."<sup>25</sup> If the time of death of the decedent and the wife cannot be determined and it cannot be established that the wife has survived the decedent by 120 hours, the UPC deems she failed to survive for the required period. As the UPC commentators point out, this type of clause is frequently found in wills to take care of the common accident situation. The Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously.<sup>26</sup>

21. UNIFORM PROBATE CODE § 2-102, Comment.

22. PA. STAT. ANN. tit. 20, § 2508 (1972).

23. UNIFORM PROBATE CODE § 2-104.

24. PA. STAT. ANN. tit. 20, § 8501 (1972).

25. UNIFORM PROBATE CODE § 2-104.

26. The Act provides that if no evidence reveals that the parties died other than

## II. RIGHT OF ELECTION

Probably the most novel concept of the UPC is that of the "augmented" estate<sup>27</sup> in connection with the right of the surviving spouse to take against a will.<sup>28</sup> This so-called "right" is designed to protect the surviving spouse of a decedent against donative transfers by will and will substitutes which would deprive the survivor of a fair share of the decedent's estate. It will be seen that Pennsylvania presently provides that the surviving spouse may also elect against certain non-testamentary transfers. Section 2-201 of the UPC provides that if the decedent was domiciled in this state, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate subject to certain limitations.<sup>29</sup> The augmented estate<sup>30</sup> can be illustrated as follows:

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simultaneously, then the property of each is disposed as if he survived. The UPC is designed to avoid multiple administration and in some instances to prevent property from passing to persons not desired by the decedent. Furthermore, it would not put a cloud upon the marital deduction under section 2056(b)(3) of the Internal Revenue Code if the spouse survives for the five days. It would, nevertheless, deprive the estate of the marital deduction if the surviving spouse died within the five day period. Hauptfuhrer, *supra* note 17, at 81.

27. UNIFORM PROBATE CODE § 2-202.

28. A widow's election is her choice whether she will take under the will or under the statute; that is whether she will accept the provision made for her in the will, and acquiesce in her husband's disposition of his property, or disregard it and claim what the law allows her. BLACK'S LAW DICTIONARY 609 (rev. 4th ed. 1968).

29. UNIFORM PROBATE CODE § 2-201.

30. The text of section 2-202 is as follows:

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

(2) Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(3) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent

*GROSS ESTATE*

(minus)

- Funeral expenses
- Administration expenses
- Homestead allowance
- Family allowances
- Exemptions
- Enforceable claims

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 = Net Probate Estate

(1) + Transfers by decedent during marriage other than to surviving spouse without receipt of adequate and full consideration in money or money's worth providing the transfer is:

- (1) one with retained benefits or controls.
- (2) one held at time of death with another with right of survivorship.

(3) transfers in contemplation of death.<sup>31</sup>

(2) + Property received by the surviving spouse from the decedent. The value as of decedent death of all property of the

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the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this subsection:

(i) Property derived from the decedent includes but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

31. Excluded is any transfer made with the written consent or joinder of the surviving spouse, life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse. Property included in the augmented net estate is valued as of the decedent's death with the exception that property given irrevocably to a donee during the lifetime of the decedent is valued as of the date when the donee came into possession or enjoyment if that occurs first. *UNIFORM PROBATE CODE* § 2-202(2). Pennsylvania has no comparable provision.



surviving spouse to the extent the property is derived from the decedent by any means other than testate or intestate succession, without a full consideration in money or money's worth furnished by the surviving spouse, whether the *property is transferred before or after the marriage*.<sup>32</sup> = Net Augmented Estate

The concept of the augmented estate is premised upon two policy considerations:

- (1) it prevents a wealthy spouse from making arrangements during his life to deliberately defeat the right of his surviving spouse to a reasonable share of his estate; and
- (2) it prevents the surviving spouse from electing a share of the probate estate when she has already received more than her statutory share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets, and other nonprobate arrangements.

In the first category (1), are transfers made by the decedent during his lifetime which are considered will substitutes.<sup>33</sup> However, only those transfers made during marriage are included in this category. Consequently, this makes it possible for the spouse decedent to provide for children by a prior marriage, as by a revocable living trust, without being concerned that such provisions will be upset by a later marriage.<sup>34</sup>

The second category of assets to be included in the estate for election purposes is much broader in scope. It embraces that property of the surviving spouse derived from the decedent, and property derived from the decedent which the spouse has given away in a transaction that is will-like in effect or purpose. Thus, a spouse can make outright gifts to relatives and friends during his life and they are not included in the

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32. Rollison, *Commentary On The Uniform Probate Code*, 30 ALA. LAW. 39, 55 (1969). Property falling within this category can be categorized as follows:

- (1) All property given to the spouse without adequate and full consideration,
- (2) Beneficial interest under a trust created by and during decedents life.
- (3) Insurance proceeds attributed to premiums paid by the decedent with surviving spouse as beneficiary, also pertains to accidental death benefits,
- (4) Commuted value of annuity proceeds under which the decedent was the primary annuitant which is attributable to premiums paid by him.
- (5) Commuted value of amounts payable after decedent's death under any public or private pension, disability compensation, death benefit or retirement plan excluding Social Security. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member or his creditors shall be deemed to have been paid by the decedent.

33. Will substitutes are those arrangements which give the decedent continued benefits or controls over the property.

34. UNIFORM PROBATE CODE § 2-202, Comment.

estate unless they are made within two years of death.<sup>35</sup> The time when the surviving spouse derives her wealth from the decedent is immaterial. For example, if a husband had purchased a house in his wife's name and over the years made systematic gifts to the wife, the house and her other accumulations will fall within the ambit of this section, resulting in the reduction of her share in the augmented estate. Life insurance proceeds payable to the surviving spouse are included in the second category.<sup>36</sup> The UPC takes the position that it is unfair to allow a surviving spouse to disturb the decedent's estate plan when the spouse has received ample provision from life insurance.

As expressed by the commentators of the UPC, in the long run this will operate to decrease substantially the number of elections<sup>37</sup> since the testator, if he complies with the UPC, cannot purposely deplete his probate estate.

The augmented estate approach is somewhat analogous in part to section 8 of the Wills Act<sup>38</sup> and section 11 of the Estates Act<sup>39</sup> under which a spouse who elects to take against a will must also elect to take against inter vivos conveyances of assets by one who retains a power of appointment by will or a power of revocation or consumption over the principal.<sup>40</sup>

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35. The exception being gifts made in contemplation of death.

36. UNIFORM PROBATE CODE § 2-202, Comment.

37. The reason is that the UPC will encourage and provide a legal base for counseling of testators against schemes to disinherit the surviving spouse. Secondly, the surviving spouse will not be able to elect if the decedent has already made adequate provisions for her.

38. PA. STAT. ANN. tit. 20, § 2508 (1972).

39. *Id.* § 6111.

40. See generally Comment, *Rights of the Surviving Spouse Under the Pennsylvania Wills and Estates Statutes*, 9 DUQ. L. REV. 230 (1971).

Section 2508 reads as follows:

- (a) Right of Election.—When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated: Provided, That the spouse so electing also must elect to take against all conveyances within the scope of section 6111(a) of this code (relating to conveyances to defeat marital rights), of which he is a beneficiary.
- (b) Share of estate.—The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator if the testator is survived by more than one child or by one or more children and the issue of a deceased child or children or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator.

PA. STAT. ANN. tit. 20, § 2508 (1972).

Section 6111 imports:

- (a) In general.—A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall, at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any

Prior to January 1, 1948, the law was clearly settled that:

[a] husband could lawfully dispose of his personal property free from post mortum claims by his widow (1) by an absolute gift or (2) by an irrevocable inter vivos trust in which he reserved for himself or created for another a life estate with remainder to a named person or a named charity, or (3) by an active revocable inter vivos trust in which he reserved to himself, or gave to another, the income for life, with a gift of the remainder to a named person (or persons) or to a named charity (or charities) provided he divested himself at the time of the creation of the trust of the ownership and control of the property (a) except for an *unexercised* power to revoke or modify in whole.<sup>41</sup>

Thus, it was settled that a husband could easily defeat a wife's right in that property which normally she would acquire at her husband's death had he still been the absolute owner. The law was such that these gifts were not considered testamentary in nature and those beneficiaries acquired a vested remainder under the trust agreement at its creation. Consequently, an election by the surviving spouse to take against the decedents will would leave her without any rights in the income or principal of any of the gifts or trusts.

The Pennsylvania legislature remedied this unjust transparent trust device in 1947 by providing that:

[S]o far as a surviving electing wife was concerned, a conveyance of

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income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise, nor to employee death benefits described in section 6108 of this code (relating to designation of beneficiaries of insurance or employee death benefits not testamentary), whether payable in trust or otherwise.

- (b) Determination of share.—The spouse may elect to take against any such conveyance and shall be entitled to one-third thereof if the conveyor is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child, and in all other circumstances one-half thereof.
- (c) Election against other conveyances.—A spouse electing under this section also must elect to take against the will, if he is a beneficiary thereunder, and against all other conveyances within the scope of subsection (a) of this section of which he is a beneficiary.
- (d) Procedure.—The election to treat a conveyance as testamentary shall be made in the same manner as an election to take against the will. If there is a will, such election shall be made within the same time limitations as an election to take against the will. If there is no will, such election shall be made within one year of the conveyor's death, and the orphans' court, on application of the surviving spouse made within such period, may extend the time for making the election. It can be made only if there has been no forfeiture of the right to make an election. The court having jurisdiction of the deceased conveyor's estate shall determine the rights of the surviving spouse in the property included in the conveyance.

PA. STAT. ANN. tit. 20, § 6111 (1972).

41. Behan Estate, 399 Pa. 314, 318, 160 A.2d 209, 212 (1960).

property by a husband was testamentary to the extent that he retained dominion and control over the conveyed property by a power of revocation, or consumption, or appointment by will, subject only to the rights of a defined income beneficiary.<sup>42</sup>

It can be seen that section 11 of the Estates Act changed and modified the well-settled law of Pennsylvania. Now the surviving electing spouse has certain rights with respect to property which had at one time belonged to the decedent.

Under the Uniform Probate Code, the surviving spouse's elective share is always one-third, but instead of being computed on the probate estate, as Pennsylvania does, it is a share of an "augmented" estate discussed previously. The augmented estate can be likened to, but is not identical with the Federal Estate Tax gross estate.<sup>43</sup> Thus, it becomes somewhat apparent that the electing surviving spouse in Pennsylvania will benefit more under our existing statutory law as opposed to section 2-202 of the UPC. For example, suppose a testator devised his entire probate estate—consisting of a farm worth \$70,000 to his son by his first wife; leaving his surviving spouse \$100,000 in life insurance and a right of survivorship to a town house owned by the entirety worth \$40,000. Under Pennsylvania law<sup>44</sup> the surviving spouse could demand a share of a third of the farm in addition to the insurance proceeds and the town house. However, under the UPC, she would be required to bring the insurance and the town house into hotchpot,<sup>45</sup> with the result that she would get no part of the farm.<sup>46</sup> To illustrate:

*Pennsylvania*

\$23,333 ( $\frac{1}{3}$  of 70,000 farm)  
\$40,000 (value of house)  
\$63,000  
\$100,000 (life insurance)  
\$163,000 share of surviving spouse

*Uniform Probate Code*

\$210,000 is total value of estate. If the surviving spouse elects to go against the will, her share ( $\frac{1}{3}$ ) would be \$70,000. She is receiving \$100,000 in life insurance; therefore that is the most she could receive.

42. *Id.* at 139, 160 A.2d at 213.

43. Fratcher, *Estate Planning and Administration Under the Uniform Probate Code*, 110 TRUSTS ESTATES 5, 7 (1971).

44. PA. STAT. ANN. tit. 20, § 6111 (1972).

45. Hotchpot is part of the common law, and it constitutes blending or throwing of property into common lot or stock for equality of division. *Laughlin Estate*, 354 Pa. 43, 48, 46 A.2d 477, 479 (1946).

46. Fratcher, *supra* note 43, at 8. Pennsylvania gives the surviving spouse an interest in real estate conveyed during marriage without joinder of the surviving spouse whether or not adequate and full consideration was given for it. PA. STAT. ANN. tit. 20, § 2105 (1972).

Under the Pennsylvania law, the surviving spouse would benefit monetarily by \$63,333. Additionally, suppose a testator owned a \$50,000 house by the entirety with a right of survivorship, and was covered by \$100,000 of insurance with his spouse as the beneficiary. Furthermore, suppose he had \$10,000 worth of personal property which he wanted to leave to his children and grandchildren to remember him by. At his death, his surviving spouse would receive the \$50,000 house and the \$100,000 insurance proceeds automatically and she could still elect to go against the \$10,000 personal property he wanted to leave to his lineal heirs. In this way the surviving spouse receives more than the testator had planned. She completely distorted his meager estate planning scheme. Which approach is better is really a policy decision. The influencing factor is the inclusion or exclusion of the life insurance proceeds in the estate for election purposes.

When planning an estate, insurance is a very important factor to consider. In Pennsylvania it matters not whether the surviving spouse receives \$5,000 or \$500,000 as beneficiary from insurance on the decedent's life—she does not have to include any of the proceeds in the hotchpot.<sup>47</sup> Under the UPC<sup>48</sup> the result differs. Although the surviving spouse surely would prefer Pennsylvania's approach, nevertheless, the UPC definitely allows the estate planner more flexibility in planning his estate, than does the state. This is where the policy decision appears. Do we prefer to aid the estate planner by providing more flexibility in disposing of his assets upon death or do we want to favor the surviving spouse by excluding life insurance proceeds from the estate for election purposes? Life insurance is a predominant influence in the role of estate planning. It "affects" almost every living person in the country.<sup>49</sup> It is the nation's most popular single savings method.<sup>50</sup> Well over 125,000,000 people are paying \$12,000,000,000 annually for \$500,000,000,000 coverage.<sup>51</sup> It is no wonder that the life insurance industry is one of the largest in America.<sup>52</sup> So the inclusion of life insurance in the augmented estate and its exclusion under section 11 of the Estates Act raises interesting problems of concern to the legislature.

47. *Henderson Estate*, 395 Pa. 215, 149 A.2d 892 (1959); PA. STAT. ANN. tit. 20, § 6111 (1972).

48. UNIFORM PROBATE CODE § 2-202.

49. R. MEHR & R. OSLER, *MODERN LIFE INSURANCE* 28 (1967).

50. *Id.* at 24.

51. *Id.* at 23.

52. *Id.* at 27.

Although the Uniform Probate Code's augmented net estate approach is relatively complex, a close examination of possible interpretations of its language seems to reveal there is not much latitude for expanding its breath as there is with section 11 of the Estates Act. However, it is practically all-inclusive in its present form. Pennsylvania's approach can be described as a short form statute. In as much as the terms "conveyance of assets," "power of consumption," and the like are not defined, it is not surprising to find much uncertainty as to the statutes' coverage.<sup>53</sup> Transfers are included or excluded dependent upon characteristics which bear little relevance to the underlying policies which the statute is designed to accommodate. For example, one-half of a joint tenancy is within the statute's purview because the decedent could have consumed that one-half during his life<sup>54</sup> but none of the property in a tenancy by entirety is available because such a tenancy is not susceptible to the husband's unilateral control.<sup>55</sup> As testamentary substitutes, the two tenancies are one and the same.<sup>56</sup>

Section 11 of the Estates Act provides the surviving spouse's share in inter vivos conveyances within its ambit, as one-third if the decedent is survived by more than one child, or issue, and one-half under all other circumstances. The UPC,<sup>57</sup> as discussed earlier, limits the share of the surviving spouse to one-third of the augmented estate under all circumstances. Here again, it can be seen that Pennsylvania smiles on its surviving spouse more so than the UPC.

In Pennsylvania, section 11 of the Estates Act encompasses totten trusts,<sup>58</sup> pension funds,<sup>59</sup> annuity contracts,<sup>60</sup> retirement funds,<sup>61</sup> gifts causa mortis,<sup>62</sup> and the like. Generally, these types of arrangements

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53. Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 525 (1970) [hereinafter cited as Clark].

54. Longaire v. Hornblower 83 Pa. D. & C., 259 (C.P. Phila. Co. 1952).

55. Mitchell Estate, 22 Pa. Fid. Rep. 240 (O.C. Montg. Co. 1972); Orth Estate, 18 Pa. Fid. Rep. 26 (O.C. Montg. Co. 1967).

56. Clark, *supra* note 53, at 526. This view, however, is unrealistic. Joint tenants with someone other than your spouse is different than tenancy by the entirety. Tenancy by the entireties of property purchased during the marriage is really a gift to the spouse not contributing thereto which is not testamentary.

57. UNIFORM PROBATE CODE § 2-201.

58. Rogers Estate, 374 Pa. 246, 97 A.2d 789 (1953); Scanlons Estate, 313 Pa. 424, 169 A. 106 (1933); Drejko's Estate, 34 Pa. D. & C.2d 233 (C.P. Phila. Co. 1964). A totten trust is "[a] deposit by one person of his own money in his own name a trustee for another . . ." *In re Totten*, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904).

59. Blair Estate, 17 Pa. Fid. Rep. 231 (O.C. Erie Co. 1967).

60. Fitzgerald Estate, 42 Pa. D. & C.2d 676 (C. P. Alleg. Co. 1967).

61. Maley Estate, 21 Pa. Fid. Rptr. 618 (O.C. Schuyl. Co. 1971).

62. Elliotts Estate, 312 Pa. 493, 167 A. 289 (1933).

provide the decedent with either a power to revoke (or change beneficiaries) or the power to consume. Section 2-202(2) of the UPC explicitly emits that life insurance, accident insurance, annuities, or pensions payable to a person other than the surviving spouse are not to be included in the augmented estate. Thus, it is apparent that the testator is given more flexibility in planning his estate than does section 11 of the Estates Act.

### III. WAIVER OF RIGHT OF ELECTION OR FORFEITURE

The UPC and Pennsylvania both recognize the "waiver" of the right to elect and of other rights. Generally, such waivers are consummated either before<sup>63</sup> or after the marriage<sup>64</sup> by a written contract, agreement, or waiver signed by the parties after full and fair disclosure. Thus, the right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance may be waived either wholly or partially under the UPC. Homestead and exemption statutes are American inventions which have little or no common law background. The primary purpose of statutes of this type is to protect the spouse and family of an insolvent debtor from claims by creditors against his residence and certain items of personal property necessary for his livelihood. This protection is necessary for a spouse and minor children after the death of the debtor and for this reason, these statutes do assure the surviving spouse some interest in the estate of the decedent which is protected from creditors.<sup>65</sup> The right to waive statutory rights in the other spouse's property appears

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63. UNIFORM PROBATE CODE § 2-204; *see* Hillegass Estate, 431 Pa. 144, 244 A.2d 672 (1968); Gelb Estate, 425 Pa. 117, 228 A.2d 367 (1967); Kaufman Estate, 404 Pa. 131, 171 A.2d 48 (1961). Good faith is a prerequisite for any antenuptial agreement to be valid. To satisfy the requirement of good faith, the decedent must have made a reasonable provision for the surviving spouse, or in absence of such provision, a full and fair disclosure of his worth. In evaluating the reasonableness of any provision for his wife, the court will be guided by the following factors:

- (1) financial worth of the husband;
- (2) the financial status of the wife;
- (3) the age of the parties and the number of children each has;
- (4) the intelligence of the parties;
- (5) whether the wife assisted in the accumulation of the husband's wealth.

It can be seen, Pennsylvania's approach is restrictive compared with section 2-204.

64. Post-nuptial agreements must be free from fraud, concealment, and overreaching. *Inskipt's estate*, 324 Pa. 406, 409, 188 A. 127, 128 (1936).

65. *See generally* AMERICAN LAW OF PROPERTY §§ 5.75-.120 (A.J. Casner ed. 1952). Pennsylvania provides only for a family exemption, PA. STAT. ANN. tit. 20, § 3121 (1972), which also can be waived. *Dekarski Estate*, 15 Pa. Fid. Rptr. 576 (O.C. Wash. Co. 1966); *Jacksons Estate*, 33 Pa. D. & C.2d 402 (C.P. Montg. Co. 1965).

desirable in view of second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse.

The UPC also provides that a complete property settlement entered into after, or in anticipation of separation or divorce operates as "a waiver of all rights to [an] elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement."<sup>66</sup> More will be said concerning the aforementioned allowances shortly.

The UPC also provides that divorce between spouses automatically denies the other from participating in the decedent's estate.<sup>67</sup> It is thus apparent that under the UPC, it requires a definitive legal act to bar the surviving spouse. Where there is only a legal separation rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under section 2-204 as a renunciation of benefits under a prior will and by intestate succession. The UPC also excludes "divorce from bed and board" as an event which affects devises or marital rights on death.<sup>68</sup> Pennsylvania, on the other hand, takes a more relaxed approach. Desertion<sup>69</sup> in addition to divorce<sup>70</sup> may be sufficient to defeat the surviving spouse's right to any interest in her deceased husband's estate. Adultery during a consensual separation on the part of one spouse, can lead to wilfull and malicious desertion and thus amount to a forfeiture as to any interest in the estate of the innocent spouse.<sup>71</sup> If both spouses commit adultery after a separation by mutual consent, neither spouse may share in the other's estate.<sup>72</sup>

There remains one other proviso which forfeits the surviving spouse's

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66. UNIFORM PROBATE CODE § 2-204.

67. *Id.* § 2-802.

68. *Id.* § 2-508, Comment.

69. For intestacy purpose: PA. STAT. ANN. tit. 20, § 2106 (1972). A willful and malicious desertion within the meaning of the Intestate Act is an actual abandonment of matrimonial cohabitation with intent to desert, without cause or consent of the other party. It consists of the same type of conduct considered as desertion under the Pennsylvania divorce statute, PA. STAT. ANN. tit. 23, § 10 (1955). Watt Estate, 409 Pa. 44, 185 A.2d 781 (1962). For right of election purposes: PA. STAT. ANN. tit. 20, § 2509 (1972).

70. PA. STAT. ANN. tit. 20, § 2507(2) (1972); see March's Estate, 426 Pa. 364, 231 A.2d 168 (1967).

71. Lodge's Estate, 287 Pa. 184, 134 A. 472 (1926).

72. Archer Estate, 363 Pa. 534, 70 A.2d 857 (1950).



right to share in the estate of the deceased and that is the intentional killing of the decedent. Both Pennsylvania<sup>73</sup> and the UPC<sup>74</sup> are in harmony in regards to the slaying of the decedent. One who participates in the intentional killing of the decedent is not entitled to acquire any benefits from the estate of the deceased. There is a conflict, however, between the UPC and Pennsylvania when the surviving spouse has murdered her husband and they had owned property in tenancies by the entireties. Under the UPC:

Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies and tenancies by the entirety in real and personal property . . . .<sup>75</sup>

This wording might lend itself to two interpretations. One, the surviving spouse gets nothing, or two, the surviving spouse retains her one-half interest in the property in fee simple. The author suggests the latter interpretation appears to be more feasible.

Pennsylvania, would adhere to section 8805 of the Slayers Act.<sup>76</sup> Under the same factual situation, the decedent's heirs would receive one-half of the property in fee simple immediately, one-half interest in a life estate would go to the slayer, and the heirs of the deceased would hold a remainder in fee simple in the one-half property interest held by the slayer.

#### IV. SPOUSE UNPROVIDED FOR IN WILL

If the testator married his surviving spouse after executing a will, [t]he omitted spouse shall receive the same share of the estate she would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent

73. PA. STAT. ANN. tit. 20, § 8802 (1972). In *Kravitz Estate*, 418 Pa. 319, 211 A.2d 443 (1963), the court held that the record of conviction and judgment of sentence in a criminal proceeding is conclusive evidence of guilt in subsequent orphan's court proceedings to determine his or her right to take under the testator's will.

74. UNIFORM PROBATE CODE § 2-803(a)-(b). Section 2-803(e) permits determination of felonious and intentional killing by the probate court even though there has been no conviction in a criminal prosecution and even though the defendant on a murder charge has been found not guilty and acquitted.

75. *Id.* § 2-803(b).

76. PA. STAT. ANN. tit. 20, § 8805 (1972). See also RESTATEMENT OF RESTITUTION § 188 (1937).

that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.<sup>77</sup>

Pennsylvania's Wills Act<sup>78</sup> practically restates the same language as the UPC. These statutes reflect the view that the intestate share of the spouse is what the decedent would want the spouse to have if he had thought about the relationship of his old will to the new situation. Consequently, both sections provide for the surviving spouse to receive at a minimum, the intestate share.

#### V. EXEMPT PROPERTY AND ALLOWANCES

The surviving spouse of a deceased domiciliary, under the UPC, is entitled to certain preferences over unsecured creditors of the estate and to other legatees to whom the estate may be devised by will. The UPC provides for a homestead allowance,<sup>79</sup> exempt property,<sup>80</sup> and a family allowance.<sup>81</sup> The homestead allowance entitles the surviving spouse to \$5,000 exempt from, and having priority over, all claims against the estate. This allowance is in addition to any share passing to the surviving spouse under the decedents will unless provided by intestate succession or by way of elective share.<sup>82</sup>

The exempt property proviso gives the surviving spouse, in addition to the homestead allowance, up to \$3,500 in value in household furniture, automobiles, furnishings, appliances, and personal effects. The \$3,500 is in excess of any security interest in the chattel. If the exempt property selected and the value of the property in excess of the security interests is less than \$3,500 or there is not \$3,500 worth of exempt property in the estate, the spouse is entitled to other assets in the estate to make up the difference.<sup>83</sup>

Lastly, the surviving spouse is entitled to a reasonable allowance in money out of the estate for maintenance during administration of the estate, not to exceed a period of one year.<sup>84</sup> What is reasonable must be

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77. UNIFORM PROBATE CODE § 2-301.

78. PA. STAT. ANN. tit. 20, § 2507(3) (1972). If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share.

79. UNIFORM PROBATE CODE § 2-401.

80. *Id.* § 2-402.

81. *Id.* § 2-403.

82. *Id.* § 2-401.

83. *Id.* § 2-402.

84. *Id.* § 2-403.

decided on the basis of the facts of each individual case. Nevertheless, the personal representative may not determine an allowance of more than \$500 per month or \$6,000 per year without a court order.<sup>85</sup>

If there is no surviving spouse alive at the death of the decedent, the UPC awards the decedent's minor children, under all three provisions that share the surviving spouse would have received had she been living.<sup>86</sup> The combination of the three allowances could provide the surviving spouse or the decedent's minor children up to \$14,500 whether or not the decedent dies intestate or testate.

Pennsylvania attorneys are familiar only with the family exemption. The state's family exemption,<sup>87</sup> like the Uniform Probate Code, is designed to care for the support of the family during the settlement of the estate and is a benefit in addition to any other conferred by the Wills or Intestate Acts. The amount allowable is \$1,500 of either real or personal property or both to provide for the surviving spouse, and if there is no surviving spouse, then to the children who are members of the same household. In the event there are no children, then the parent or parents of the decedent who are members of the same household may claim the exemption.<sup>88</sup>

It is readily gleaned from this section of the comment that the surviving spouse would stand to gain an additional \$13,000 under the provisions of the UPC. But the commentators to the UPC note that states adopting the UPC may see fit to alter the dollar amounts suggested in the foregoing sections, or to vary the terms and conditions so as to accommodate existing traditions. As far as Pennsylvania is concerned, the \$1,500 family exemption is far too low. It is suggested by the author, that if Pennsylvania fails to adopt the homestead allowance and exempt property provisions of the UPC, it should, at the minimum, increase its family allowance to \$5,000.

## VI. CONCLUSION

Under the intestacy provisions of the UPC, the Pennsylvania surviving spouse, would probably benefit more than she presently does. However, if there is a will involved and the surviving spouse decides to go against the will, section II of this analysis exemplifies that she would

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85. *Id.* § 2-404.

86. *Id.* §§ 2-401 to -402.

87. PA. STAT. ANN. tit. 20, § 3121 (1972).

88. *Id.*

probably prefer Pennsylvania's approach rather than the UPC. The UPC, more than adequately, provides for the surviving spouse under its exempt property and allowance section. It provides for a homestead allowance (\$5,000), exempt property (\$3,500) and a family allowance (\$6,000), whereas Pennsylvania recognizes only a \$1,500 family exemption. But there is less need for uniformity of law regarding these provisions than is true of other sections of Article II of the UPC.

Presently, the UPC is being actively studied in Pennsylvania by various bar and banking associations and over forty additional states. Idaho and Maryland have already adopted certain parts of the UPC. In the near future, legislative actions is probable in twelve additional states.<sup>89</sup> Whether or not Pennsylvania adopts any of the major concepts of the UPC pertaining to the surviving spouse will be merely a policy decision.

The primary thrust of the UPC is to provide uniformity, flexibility, and predictability in this day of family mobility. These considerations should definitely give the Pennsylvania legislator "food for thought." Uniformity in probate law appears to be the UPC's greatest asset. If adopted by the majority of states, it "should go far toward restoring public confidence in the basic institution of succession and in the lawyers who are so closely related to it."<sup>90</sup>

RICHARD D. LINDERMAN

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89. Davis, *supra* note 5, at 11.

90. Wellman, *supra* note 6, at 640.